Supreme Court of the United States

No. 233.

GEORGE M. BAYLY, INDIVIDUALLY AND AS EXECUTOR OF R. H. BAYLY, DECEASED, PLAINTIFF IN ERROR.

vs.

THE WASHINGTON AND LEE UNIVERSITY

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

Brief for Plaintiff in Error.

JOHN H. KENNARD,
W. W. HOWE,
for Appellants.

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No. 233.

GEORGE M. BAYLY, Individually and as Executor of R. H. Bayly, Deceased, Plaintiff in error.

vs.

THE WASHINGTON AND LEE UNIVERSITY

In error to the Supreme Court of Louisiana.

Brief for Plaintiff in Error.

The sole question at issue in this case is whether G. M. Bayly, executor, is to be held personally responsible for $18,021 79, the amount due the succession of R. H. Bayly—of which (he G. M. Bayly) was executor at the date when the commercial firm of G. M. Bayly & Pond were adjudicated on their own petition, bankrupts.

G. M. Bayly, Executor, was a member of the firm of G. M. Bayly & Pond.

The construction of Secs. 5117 and 5103, U. S. Rev. Statutes, when applied to the facts of this case, must determine this question :

The language of Section 5117 is : " No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

We shall first consider the position of the executor as if the bankruptcy were an *ordinary* one, to which the section 5117, Revised Statutes was intended to apply, and shall then endeavor to show, that the discharge of the bankrupt from *this* debt is to be determined under the provisions of the *Composition* clause of the bankrupt act, found in the amendment to section 5103, U. S. Rev. Statutes, (adopted 22 d June, 1874, § 17), 9 Bump. p. 676, (top).

We shall maintain that the provisions of a composition accepted are binding on *all* the creditors, *without exception*, whose names and addresses, and the amount of whose debts are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed.

In this connection we avoid confusion, by noting that the U. S. States Revised Statutes, include only the laws in force on the first day of December, 1873, whereas the Composition clause of the bankrupt law was enacted six months later, "to-wit:" 22d June, 1874, § 17.

It is consequently *an addition* to the bankrupt law as found in the Revised Statutes, and the *last* expression of the will of Congress on the subject.

See Wells vs Lamprey, N. B. R. No. 5, p. 205, Sept. 15th, 1877, as to effect of discharge under Composition clause ; Supreme Court of New Hampshire ; also Owsley et al., vs. Cobia et al., Law and Equity Reporter, vol. 4, No. 3, Wednesday, July 18, 1877, p. 49, Waite C. J.

Also, In re Becket, 2 Wood's Cir. Co. Reps. 173.

Also, In re Walshe, 2 Woods, p. 225.

FACTS.

These are succinctly stated in the testimony of G. M. Bayly, Record p. 21, and of M. A. Bienel p. 24.

There is no dispute as to them.

The errors complained of in the opinion of the Supreme Court, of Louisiana, (Opinion R. p. 39), are compactly stated in the Petition for Rehearing, R. p. 32.

1. We contend that there was, error in holding Bayly to have been a fiduciary in his capacity of *commission merchant*.

2. In denying that he can be discharged under the Composition clause as executor, if the facts warranted the court in considering the acts done, as those of *executor*, and not of a commission merchant. Bayly Appellant has been condemned to pay $18,021 79, both individually and as executor.

Individually because as a commission merchant, receiving and selling produce belonging in part to the estate, he assumed the position of a fiduciary.

This is not the jurisprudence of the Supreme Court of the United States, either under the old Bankrupt law or that of 1867, as amended in 1874.

Owsley, et al., vs. Cobia, et al.

Laws Equity Reporter, vol. 4, No. 3, July 18, 1877—South Carolina Circuit, Chief Justice Waite, presiding.

Woolsey vs. Cado, 15 B. R., 238.

The case contra in Louisiana, relied upon (Banning vs. Bleakley, 27 An., 257), is an innovation upon the former jurisprudence of the State.

The cases in which this court has held commission merchants to be fiduciaries, are cases in which the facts, *course* of dealing, showed the creation of *a special trust*. As executor Bayly surely had no right to deposit Becnel's money.

Banning vs. Bleakley, 27 A., 257, so confidently relied upon by opponents, and which they say "followed the whole current of decisions," is not sound law nor the proper guide of this court in construing an act of Congress. We confidently affirm that the "whole current of decisions, State and Federal—give greater weight to an interpretation of a United States Statute by a United States Court, than by a State Court.

We again refer to the case of Owsley et al. vs. Cobia et al., Vol 4, No. 3, Law Equity Reporter,—Waite, Chief Justice.

Besides this, Banning vs. Bleakley & Co., bears in its text internal evidences of its weakness.

The case in re Kimball, 6 Blatchford, 299, is quoted to show Judge Nelson's views on the fiduciary point. An inspection of that reference and quotation, 27 An., 263, shows that Judge Nelson laid special stress upon the fact that the consignee was *instructed to remit, to sell and remit.* Not remitting at once, was a *special* breach of the trust. Having such order, to apply the proceeds to his own use, was "a gross breach of trust."

It was physically impossible for Bayly to tell what belonged to the estate represented by him—until there had been a settlement between the estate and its partner Becnel.

The language of the statute of Louisiana, relied on by appellees, Sec. 1463, Rev. Statutes, is, all "moneys collected *by them* (executors, etc.) This manifestly refers to moneys of estates. That ordinary commission merchants, are not to be held as fiduciaries, is no longer an open question in the Supreme Court of the United States.

Does this constitute an exception to the general rule ?

Section 1463, p. 287, Revised Statues of Louisiana, 1870, is invoked, to take it out of the rule.

That section reads :

"All executors, administrators, curators and syndics, shall deposit *all moneys collected* by them, as soon as the same shall come into their hands in one of the

chartered banks of this State or in one of their branches, *allowing interest on deposits*, if there be one in the parish. They shall keep a bank book in their official name, and shall on no account withdraw the deposits or any part thereof, until a tableau of distribution shall be homologated or unless ordered by a competent court and then only to pay such debts as may be ordered for payment." The omission of Bayly, executor, to make this deposit, is claimed to have made him assume a fiduciary obligation.

This money was *never collected* by G. M. Bayly as executor ; never passed into his hands as such, he neither had the right to collect it, until the amount of the interest of the succession in the fund had been determined contradictorily with Bechnel, the joint owner, nor as a matter of fact did he collect it.

The situation is identical in law with what it would have been, had the sugar and molasses from that plantation been shipped to any other firm in New Orleans. Suppose they had advanced the money to raise and take off the crop; the crop from time to time had been shipped to them from this plantation, the joint property of Bechnel and the succession ; and by the time the sales were ended there was an accumulation of eighteen thousand dollars, which they had not "instanter" turned over to the executor. In what sense can the executor be said to have collected the moneys.

Bayly, as executor, never handled a dollar of this money— it was held by a very distinct juridical person,

the commercial firm of Bayly & Pond, so that, in no proper sense, can it be styled a "collection from himself;" it never belonged to the Succession R. H. Bayly, but to the partnership of Bechnel & Bayly's Succession, consequently he had no right to pass it to the succession's credit in bank until the share of the Succession was ascertained, which had not been done when Bayly & Pond failed; the ink was hardly dry upon the books containing the entries of the sales of sugar and molasses, when on the 7th of *February*, 1876, the financial storm overtook them.

Merchants, and not banks, advance to planters, and they invariably hold the proceeds of the sales with their own deposits a longer or shorter time, as circumstances justify.

To demand any other mode of conducting the business, would be to deny successions, the usual accommodations afforded ordinary planters.

2d. Bayly is not liable individually as a fiduciary (1) under old law. (2) if under old, not under Composition amendment.

There is no denial that the Composition resolution was regularly passed and that this claim was produced at the meeting by the debtor. (R. p. 31, Opinion).

The case was fiercely litigated in both the District and Circuit Courts of the United States, and finally passed upon on a bill of review before Judge Bradley who affirmed the lower court's decision and declared

the Composition valid. 2 Woods, Rep. 222, in re Bayly & Pond. We have, now, only to consider whether the debt, even were it fiduciary (which we deny) is dischargeable under the Composition clause of the bankrupt law.

We repeat the language of the old law, Sec. 5117, to have it in juxtaposition for comparison with the clause above quoted from the Composition amendment.

"No debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity shall be discharged."

It is worthy of notice that this section refers to the technical formal discharge, provided for by an exact form in Section 5115, 9th Bump., 727, which discharge clears the bankrupt from all debts. "except such debts, *if any* as are by law excepted from the operation of a discharge in bankruptcy."

At the date of the adoption of the Revised Statutes there existed by law the exceptions enumerated above in section 5117.

The use of the expression "if any," was intended to have a special significance in the last clause of the certificate of discharge,

Composition.

While confident that the executor cannot be made liable, even without considering his case as coming under what is known as the composition clause of the

bankrupt law, which was an amendment as before stated, adopted 22d June, 1874, 9 Bump. p. 676 (top), six months after the adoption of the United States Revised Statutes, which only includes the laws up to December 1st, 1873, we shall now show that the debt is not excluded from the list of dischargeable debts under the composition clause even were it proven (as it is not) to have been created while the executor was acting in a fiduciary capacity.

We invite the Court's careful investigation of this point as it is comparatively new and one of vast practical importance. A careful comparison of the exact text of the composition clause, with that of the pre-existing law, is essential.

That portion of the law relating to the effect of a composition is in these words:

"The provisions of a composition accepted by such resolution in pursuance of this section shall be *binding on all the creditors whose names and addresses, and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.*"

What was the intention of Congress in enacting the composition clause?

Clearly, to say that it was in the power of Congress by law to do away with existing exceptions, to dischargeable debts, or to add to them. It was to leave the way open for the enactment of just such a law as is

the amendment to section 5103 Rev. Stats. (22d June 1874. § 17), which amendment has swept out of existence so far as composition is concerned, the exceptions enumerated in sec. 5117, This view is greatly strengthened when we consider that under the composition proceedings no formal discharge, with certificate as prov ded for in sec. 5115, is required.

"This point, decided first by Judge Woods of the Circuit Court, may be now considered well settled."

2 Woods, 173. In re Bechet.

16 N. B. R. No. 5, Sept. 15th, 1877, p. 205.

Wells vs. Lamprey. In this case the Supreme Court of New Hampshire, repeats the same doctrine.

There is no contrary decision.

In the above cited case of Wells vs. Lamprey, the opinion of Stanly J. Supreme Court of New Hampshire is so exactly this case in principle that for the Court's convenience, we cite the major portion of it.

"Stanly, J.

The question here presented is as to the effect of a discharge in bankruptcy by a *composition*, by which we understand that under the Act of June 22d, 1874, the defendant compounded and settled with his creditors one of whom was the plaintiff. The provision of law bearing on this question, is as follows:

In all cases of bankruptcy, now pending, or to be hereafter pending by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a

meeting called under the direction of the court, and upon not less than ten day's notice to such known creditor, of the time, place and purpose of such meeting, such notice to be personal or otherwise, as the Court may direct, resolve that a composition, proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor; and such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, either in person, or by proxy, and shall be confirmed by the signatures thereto of the debtor, and two-thirds in number and one-half in value of all the creditors of the debtor.

* * *

The provisions of a composition accepted, by such resolution, in pursuance of this section, *shall be binding on all the creditors*, whose names and addresses and the amounts of the debts due to whom are shown, in the statement of the debtor, produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors. "U. S. Stat., 1st Sess., 43d Cong., 182, Sec. 17."

Under this law, we think the plaintiff is not entitled to recover. It will be observed that the Statute, under consideration, does not exempt from its operation *any class of debts*. It, in terms, declares that the composition or settlement shall be binding on "*all* the

creditors whose names and the amount of whose debts are mentioned in the statement produced at the meeting at which the resolution has been passed." This provision is not in amendment of, or a substitute for the provisions of the Revised Statutes, but it is in *addition* to them. Under this provision, the debtor receives no discharge. He makes a settlement of his debts under the supervision and with the sanction of the Court and that settlement is declared to be binding. It is, as if the debtor went to each creditor and offered him a certain percentage to discharge his claim against him and the offer was accepted. The only difference in the two cases is, that under the act in question, the amount paid is uniform, and a certain portion of the creditors may compel the balance to discharge their claims, *whether they are willing to do so or not.*"

Appellees seem to have ignored the broad distinctions both in the law and the adjudged cases between an ordinary bankruptcy and a composition.

In re Haskell, 11 B. R., 164, Lowell, well says, (p. 166):

"It is said that this fact" (a preference given by the bankrupt) would prevent *the debtor's discharge* and therefore ought to prevent the acceptance of the *resolution* which, if recorded, is intended to work a discharge."

"As I said at the hearing, I do *not believe the statute intends that no debtor can compound with his creditors*

under this section, who would not be able to obtain his discharge."

The law seems to leave it very much to the *requisite number and amount of creditors* who if all the facts are before them may decide *the whole matter.*

The law as it were invests the creditors with a part of the judicial power, allows them to aid and regulate the Court in a large measure in determining what is for the best interest of all the creditors.

This view is entertained by Chief Justice Waite in the case of Owsley et al. vs. Cobia et at., Vol. 4, No. 3, Law and Equity Reporter. Wednesday, July 18, 1877, heretofore quoted. "The presumption *is in favor of the resolution*, and the burden rests upon the objecting creditors to produce the testimony to show that it ought not to be recorded."

There can be no doubt that Congress has plenary power to discharge whatever debts it saw fit.

The sole question is, what did they do? Why were all exceptions studiously omitted in the amendment?

There is sound reason for the change. It may well happen, and often does, that a larger percentage on a fiduciary debt may be obtained through composition than by an ordinary proceeding, which results in leaving the unfortunate debtor under such a weight of fiduciary obligations that he has no heart to re-enter the struggle of life.

This doubtless moved Congress to the addition made by the act of June 22d, 1874.

As to the Composition the Supreme Court of Louisiana says: "That a Composition was made by the bankrupt in *due form* is not denied."

The question of its effect is the only one now under consideration.

All of which is respectfully submitted, by

JOHN H. KENNARD,
W. W. HOWE,
for Appellants.